

1 THE HONORABLE BENJAMIN H. SETTLE
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7 UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

8 CHARLIE GABERTAN,

9 Plaintiff,

Case No. 3:21-cv-05032 (Closed)

10 v.

Consolidated with Case No.
3:20-cv-05520-BHS

11 WALMART INC.,

12 Defendant.

13 **DEFENDANT WALMART INC.'S
REPLY IN SUPPORT OF ITS
MOTION TO DISMISS PLAINTIFF'S
COMPLAINT**

14 NOTE ON MOTION CALENDAR:
15 February 12, 2021

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WALMART'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS
CASE NO. 3:21-cv-05032 (CLOSED)
CONSOLIDATED WITH CASE NO. 3:20-cv-05520-BHS

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I. INTRODUCTION

2 On June 1, 2020, Plaintiff Charlie Gabertan (“Plaintiff”) filed a putative class action
3 against Walmart Inc. (“Walmart”) in this Court based on a single emergency informational text
4 message that he allegedly received on April 7, 2020.¹ Six months later, Plaintiff filed this
5 separate putative class action against Walmart challenging the same text message in state court.
6 This tactic constitutes impermissible claim splitting. In his opposition to Walmart’s Motion to
7 Dismiss, Plaintiff incorrectly argues that the well-established rule against claim splitting should
8 not apply because (i) he filed his second case in state court, and (ii) the parties agreed to have
9 the two cases consolidated before this Court after Walmart timely removed this action. Neither
10 affects the claim-splitting analysis. Plaintiff’s complaint should be dismissed with prejudice.

11 Alternatively, this second action should be dismissed for failure to state a claim. Plaintiff
12 asserts a single claim under the Washington Consumer Protection Act (“WCPA”) based on an
13 alleged violation of the Washington Commercial Electronic Mail Act (“CEMA”). *See* Compl.
14 ¶¶ 31–39. CEMA is inapplicable because it applies only to text messages “sent to promote real
15 property, goods, or services for sale or lease.” Rev. Code Wash. § 19.190.010(3). Contrary to
16 Plaintiff’s argument, this single emergency informational text message did not promote any
17 goods or services for sale or lease. *See* Compl. ¶ 13. It informed Walmart Pharmacy patients of
18 socially distanced and contactless methods for accessing active prescription medications,
19 consistent with the guidance of federal and state healthcare authorities, during the declared state
20 of emergency in connection with the COVID-19 pandemic. *See id.* Therefore, it falls outside
21 the scope of CEMA.

22 In his first action, Plaintiff mischaracterized this emergency informational text message
23 to pursue a meritless Telephone Consumer Protection Act (“TCPA”) claim. Plaintiff has now
24 brought a duplicative and similarly baseless action under state law that has multiplied the

¹ See *Gabertan v. Walmart Inc.*, No. 20-5520 (W.D. Wash.) (“*Gabertan I*”).

1 proceedings. This Court should dismiss Plaintiff's second-filed complaint with prejudice and
 2 award Walmart its reasonable attorneys' fees and costs in connection with this Motion.

3 II. ARGUMENT

4 A. Plaintiff's Complaint Should Be Dismissed for Improper Claim Splitting.

5 Plaintiff admits that he filed two actions against Walmart based on the same text
 6 message. *See* Pl.'s Opp'n at 8–9. As this Court has held, “[a] plaintiff . . . is required to bring
 7 all his claims in one suit against parties and parties in privy.” *Chapel v. Recontrust Co., N.A.*,
 8 No. 10-5846, 2011 U.S. Dist. LEXIS 12179, at *6 (W.D. Wash. Feb. 8, 2011) (Settle, J.)
 9 (emphasis added). Where, as here, a plaintiff has filed two lawsuits against a defendant based
 10 on the same facts, dismissal of the second action with prejudice is warranted. *See id.*

11 Plaintiff argues he was permitted to split his claims, as long as he brought one action in
 12 federal court and the other in state court. *See* Pl.'s Opp'n at 10 & n.3. Plaintiff is mistaken. The
 13 cases Plaintiff relies on stand for the mere and uncontroversial point that a federal court should
 14 apply doctrines of abstention and comity when determining whether to stay an action in federal
 15 court. The prohibition on claim splitting applies regardless of where a plaintiff initially filed the
 16 second action. *See Vanover v. NCO Fin. Servs.*, 857 F.3d 833, 836 (11th Cir. 2017) (affirming
 17 dismissal with prejudice of a second-filed action, which was initially filed in Florida state court,
 18 after removal because of improper claim splitting); *In re Don Rose Oil, Inc.*, 614 B.R. 358, 370
 19 (Bankr. E.D. Cal. 2020) (dismissing a second-filed action, after removal from state court, on the
 20 basis of improper claim splitting); *Wellin v. Wellin*, No. 13-1831, 2014 U.S. Dist. LEXIS 72432,
 21 at *38 (D.S.C. May 28, 2014) (dismissing a later-filed action for improper claim splitting after
 22 it was removed from state to federal court).

23 Plaintiff suggests that his violation of the claim-splitting prohibition has been mooted
 24 because this Court granted the parties' stipulation to consolidate the cases after Walmart timely
 25 removed this action. Pl.'s Opp'n at 10. The parties requested consolidation so that the
 26 appropriate Court, which is already familiar with the facts and legal issues, could address

1 Plaintiff's improper tactics by "weighing the equities of the case." *Adams v. Cal. Dep't of Health*
 2 *Servs.*, 487 F.3d 684, 688 (9th Cir. 2007).

3 The cases Plaintiff relies on are either inapposite or directly contradict his position.²
 4 *Mendoza v. Amalgamated Transit Union International* is particularly instructive. Plaintiff relies
 5 on *dicta* in an opinion by the magistrate judge who was not deciding the motion to dismiss. See
 6 Pl.'s Opp'n at 11 (quoting the comment that "the court has since consolidated *Mendoza I* into
 7 *Mendoza II* and defendants' contentions of claim-splitting *may no longer be at issue*"); *Mendoza*
 8 *v. Amalgamated Transit Union Int'l*, No. 18-0959, 2019 U.S. Dist. LEXIS 230606, at *9 (D.
 9 Nev. June 24, 2019) (emphasis added)). The district court, however, ignored this comment,
 10 applied the *Adams* factors, and dismissed with prejudice the second-filed action because it
 11 "constitute[d] impermissible claim splitting." See *Mendoza v. Amalgamated Transit Union Int'l*,
 12 No. 18-0959, 2019 U.S. Dist. LEXIS 151029, at *26 (D. Nev. Sept. 5, 2019) (emphasis added).
 13 The same result is warranted here.

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17 ² See *Warren v. United States*, No. 92-35558, 1993 U.S. App. LEXIS 18389 (9th Cir. July 14,
 18 1993) (not involving claim splitting); *In re Don Rose Oil, Inc.*, 614 B.R. at 370 (dismissing a second-filed action
 19 for improper claim splitting); *Abhari v. Victory Park Capital Advisors, Inc.*, No. 20-5734, 2020 U.S. Dist. LEXIS
 20 247258, at *15 (C.D. Cal. Sept. 17, 2020) (noting *sua sponte* that plaintiffs had filed a similar action that "appear[ed]
 21 to violate the rule against claim splitting" and instructing plaintiffs to correct their error when filing their amended
 22 complaint); *Brooke v. Aju Hotel Silicon Valley LLC*, No. 19-5559, 2019 U.S. Dist. LEXIS 220035, at *5 (N.D. Cal.
 23 Dec. 23, 2019) (electing to consolidate two actions rather than dismiss the later-filed action without addressing the
 24 Ninth Circuit standard set forth in *Adams* or any case law); *Diaz v. Sun-Maid Growers*, No. 19-0425, 2019 U.S.
 25 Dist. LEXIS 129839, at *14 (E.D. Cal. Aug. 1, 2019) (not reaching "the issue of the alleged impermissible claim
 26 splitting"); *T.K. v. Stanley*, No. 16-5506 (W.D. Wash. Oct. 11, 2016), *recons. denied* by 2016 U.S. Dist. LEXIS
 147763, at *4 (W.D. Wash. Oct. 25, 2016) (Settle, J) (noting that the doctrine of abstention may apply when an
 action pending in federal court is duplicative of a state court action); *Horner v. Select Portfolio Servicing*, No. 12-
 0666, 2012 U.S. Dist. LEXIS 135681, at *6 (E.D. Cal. Sep. 20, 2012) (applying the *Adams* factors based on the
 specific equities in that case, in which the later-filed action did not involve the same defendant as the earlier-filed
 action); *Leonard v. Stemtech Int'l, Inc.*, No. 12-0086, 2012 U.S. Dist. LEXIS 120525, at *31–32 (D. Del. Aug. 24,
 2012) (electing to consolidate the actions because "the operative events at issue in [the second action] occurred well
 after the date of the Amended Complaint in [the first action]"); *Britz Fertilizers, Inc. v. Bayer Corp.*, No. 07-0846,
 2008 U.S. Dist. LEXIS 8356, at *46 (E.D. Cal. Feb. 5, 2008) (applying the *Adams* factors and finding consolidation
 was warranted where the plaintiff alleged the claims in the second action were based on a different agreement than
 the first).

B. Alternatively, Plaintiff's Complaint Should Be Dismissed for Failure to State a Claim.

CEMA applies only to text messages that promote goods or services for sale or lease. See Rev. Code Wash. § 19.190.010(3); see also *Hickey v. Voxernet LLC*, 887 F. Supp. 2d 1125, 1132 (W.D. Wash. 2012).³ Consistent with Plaintiff’s arguments in *Gabertan I*, Plaintiff disregards the plain language and context of the text message at issue to contend it promotes goods or services for sale. This text message, however, provided *information* to patients about how to *access their active prescriptions* during the declared state of emergency. It did not promote the sale of any goods or services.

Plaintiff does not address the cases cited by Walmart in its Motion to Dismiss. Instead he cites inapposite cases involving messages that facially and contextually promoted the sale of goods or services. *See* Pl.’s Opp’n at 15–19. As set forth in Walmart’s Motion to Dismiss, the inclusion of a hyperlink in the text message does not change the analysis. The hyperlinked web page provided additional information about “Walmart Pharmacy’s Coronavirus safety response,” including information on socially distanced and contactless methods for accessing prescriptions. *See* Mot. to Dismiss at 8 n.6. It did not, as Plaintiff suggests, “advertise[] various services and products.” *See* Pl.’s Opp’n at 19. The inclusion of this link does not transform the informational message into a marketing solicitation. *See An Phan v. Agoda Co. Pte. Ltd.*, 351 F. Supp. 3d 1257, 1266 (N.D. Cal. 2018), *aff’d*, 798 F. App’x 157 (9th Cir. 2020); *Vallianos v. Schultz*, No. 19-0464, 2019 U.S. Dist. LEXIS 174729, at *9–10 (W.D. Wash. Oct. 8, 2019) (“[T]he mere inclusion of a link to a website on which a consumer can purchase a product does not transform the whole communication into a solicitation.”).

³ Plaintiff erroneously suggests that the Ninth Circuit has rejected the holding in *Hickey*. See Pl.’s Opp’n at 13–14. But the Ninth Circuit has not reached that issue. See *Gragg v. Orange Cab Co.*, No. 12-0576, 2013 U.S. Dist. LEXIS 7474, at *12 (W.D. Wash. Jan. 17, 2013) (noting the Ninth Circuit has determined that “a direct and immediate sale need not be in the [offering] to trigger the [Washington Automatic Dialing and Announcing Device Act]”).

1 “Courts approach the question of whether a message constitutes advertising or
 2 telemarketing with a measure of common sense.” *An Phan*, 351 F. Supp. 3d at 1261 (internal
 3 quotation marks and citation omitted). As set forth in Walmart’s Motion to Dismiss, text
 4 messages, like the one alleged here, that “merely seek to gather or impart important information”
 5 do not constitute advertising or telemarketing. *Dennis v. Amerigroup Wash., Inc.*, No. 19-5165,
 6 2020 U.S. Dist. LEXIS 22832, at *12 (W.D. Wash. Feb. 10, 2020); *see also* Mot. to Dismiss at
 7 7–8 (collecting cases). This text message did not promote any goods or services for sale, and it
 8 is outside the scope of CEMA. Plaintiff’s complaint should be dismissed with prejudice. *See*
 9 *Hickey*, 887 F. Supp. 2d at 1132; *see also Dennis*, 2020 U.S. Dist. LEXIS 22832, at *12; Mot.
 10 to Dismiss at 5–8.

11 **C. Walmart Should Be Awarded Reasonable Attorneys’ Fees in Connection With This**
 12 **Motion.**

13 Plaintiff has “unquestionably multiplied the proceedings,” and, as a result, Walmart
 14 should be awarded its reasonable attorneys’ fees and costs in connection with responding to this
 15 improperly-filed action. *See Anderson v. United Stationers Supply Co.*, No. 97-15631, 1998
 16 U.S. App. LEXIS 7596, at *4 (9th Cir. Apr. 16, 1998) (“Since counsel’s
 17 efforts . . . unquestionably multiplied the proceedings before the district court, the imposition of
 18 monetary sanctions upon counsel was not an abuse of discretion.”). Plaintiff’s argument that his
 19 claim-splitting tactic only became improper when Walmart removed this action is baseless.
 20 Courts apply the claim-splitting analysis to removed actions. *See Vanover*, 857 F.3d at 836; *In*
 21 *re Don Rose Oil, Inc.*, 614 B.R. at 370; *Wellin*, 2014 U.S. Dist. LEXIS 72432, at *38.⁴ In
 22 addition, claim splitting is precluded under both federal and Washington State procedural law.
 23 *See Chapel*, 2011 U.S. Dist. LEXIS 12179, at *4 (explaining that a plaintiff must “bring at one
 24 time all of the claims against a party or privies relating to the same transaction or event” (citing

25 ⁴ Plaintiff’s suggestion that Walmart removed his improperly filed state court action to “lay a
 26 ‘sanctions trap’” is baseless. *See* Pl.’s Opp’n at 19–20. Walmart removed the action because this Court has jurisdiction under CAFA. *See* Notice of Removal, Dkt. No. 1.

1 *Adams*, 487 F.3d at 693–94)); *Harris v. Providence Everett Med. Ctr.*, No. 66407-7-I, 2012
 2 Wash. App. LEXIS 874, at *4 (Ct. App. Apr. 16, 2012) (“Filing two separate lawsuits based on
 3 the same event—claim splitting—is precluded in Washington.” (quoting *Landry v. Luscher*, 976
 4 P.2d 1274, 1276 (Wash. Ct. App. 1999)) (additional citation omitted)); *see also supra* § II.A.

5 Because Plaintiff improperly filed this second action, which has unnecessarily multiplied
 6 the proceedings, Walmart should be awarded its reasonable attorneys’ fees and costs in
 7 connection with this Motion. 28 U.S.C. § 1927; Rev. Code Wash. § 4.84.185; *Hyytinens v.*
 8 *Morhous*, No. 14-5537, 2015 U.S. Dist. LEXIS 26654, at *10 (W.D. Wash. Mar. 3, 2015) (Settle,
 9 J.); *Irving v. AMTRAK*, No. 13-5713, 2015 U.S. Dist. LEXIS 4023, at *3–4 (W.D. Wash. Jan.
 10 12, 2015) (Settle, J.); *Lucas v. Camacho*, No. 11-5350, 2012 U.S. Dist. LEXIS 133367, at *3
 11 (W.D. Wash. Sep. 18, 2012) (Settle, J.).

12 III. CONCLUSION

13 For the foregoing reasons, Walmart respectfully seeks dismissal of Plaintiff’s complaint
 14 with prejudice and an award of its reasonable attorneys’ fees and costs incurred in connection
 15 with this Motion.

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 17 Dated: February 12, 2021

Respectfully submitted,

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